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No. 78-1505

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY D. GIACALONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 587 F. 2d 5 (Pet. App. A3-A5).

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1978. A petition for rehearing was denied on February 7, 1979. On February 16, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 7, 1979. The petition for a writ of certiorari was filed on April 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the "reasonable doubt" standard is applicable to the trial court's determination of the legal question of materiality in a perjury prosecution.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of making false declarations before a court or a grand jury, in violation of 18 U.S.C. 1623, and on one count of perjury, in violation of 18 U.S.C. 1621. Petitioner received a concurrent sentence of 18 months' imprisonment on each count, and was fined a total of $10,000. The court of appeals affirmed (Pet. App. A3-A5).

1. On March 27, 1975, and April 2, 1975, petitioner appeared before a grand jury investigating his parents' federal income tax liability. He there testified that he had received a total of $25,000 in cash as wedding gifts when he was married in February 1970 and that he had invested the entire sum in a family business. He further acknowledged that the $25,000 represented "the sum total of the wedding gifts" (Tr. 31-45, 94-100, 105-106, 114).

On April 2, 5, and 6, 1976, in the United States District Court for the Eastern District of Michigan, petitioner appeared as a witness in his father's trial for tax evasion. The government alleged that petitioner's father, Anthony J. Giacalone, had failed to report almost $90,000 in taxable income for the years 1968 through 1971. To prove its case, the government introduced in evidence a summary showing an

unexplained increase in the senior Giacalone's net worth for those years. Petitioner testified on behalf of his father, stating that he had received $104,000 in wedding gifts, and not $25,000 as he had previously testified. The $79,000 difference between petitioner's trial testimony and his grand jury statements arguably accounted for most of the money that the government charged his father with having failed to report. Petitioner further testified that he used approximately $39,000 of the $104,000 to invest in the family business, to pay wedding expenses, and to buy his wife a new car. Petitioner then stated that his father had given him the remaining $65,000 in cash and that he (petitioner) took it to Florida on his honeymoon (Tr. 120-131). The inconsistencies between petitioner's trial and grand jury testimony regarding the amount and disposition of his wedding gifts formed the basis of the three false statement counts.

Petitioner also testified at his father's trial that on October 28, 1969, his father had given him $8,324, before leaving for work (Tr. 132-135). However, at petitioner's trial, the government introduced evidence that petitioner's father was in the hospital on that day (Tr. 269, 278-279). The perjury count was predicated on this testimony.

2. At the close of evidence at petitioner's trial, the district court ruled that petitioner's statements in the grand jury and court proceedings involving his father were material as a matter of law. The court noted that the elder Giacalone's defense had been based, in part, on petitioner's testimony. The court declined to indicate whether it had found petitioner's statements

material beyond a reasonable doubt, stating that such a factual standard was inappropriate to the determination of a question of law. Thereafter the court instructed the jury that petitioner's statements were material as a matter of law (Tr. 224-229, 468, 695-697, 716, 721).

ARGUMENT

Petitioner contends (Pet. 8-13) that the Due Process Clause requires that the trial court find that his false statements were material beyond a reasonable doubt. However, as the court of appeals correctly concluded (Pet. App. A5), the reasonable doubt standard, which is applicable to factual questions in a criminal trial, is inapposite to the determination of the legal question of materiality. No court of appeals has reached a contrary conclusion, and further review of this case by the Court is unwarranted.

It is well-established that the determination of materiality in a perjury prosecution is a question of law for the court. *E.g., Sinclair* v. *United States,* 279 U.S. 263, 298-299 (1929); *United States* v. *Damato,* 554 F. 2d 1371, 1373 (5th Cir. 1977); *United States* v. *Percell,* 526 F. 2d 189 (9th Cir. 1975). The resolution of that legal issue, like the determination of the relevancy of evidence offered at trial, involves the analysis of generally undisputed facts in light of existing authorities, and does "not depend upon the probative value of evidence." *Sinclair* v. *United States,*

supra, 279 U.S. at 298.[1] Accordingly, the "reasonable doubt" standard, which reflects the degree of certainty that the factfinder in a criminal trial must entertain in resolving conflicting accounts of past events, has no bearing upon the question of materiality.[2]

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[1]Petitioner does not dispute that he made the statements in question during his testimony before the grand jury and at his father's trial. Thus, this case does not present the question whether a trier of fact would have to apply a "reasonable doubt" or "preponderance of the evidence" standard in circumstances where the issue of materiality turned on disputed facts.

[2]Petitioner erroneously relies upon *United States* v. *Lasater,* 403 F. Supp. 208 (W.D. Mo. 1975), aff'd, 535 F. 2d 1041 (8th Cir. 1976), since there the district court specifically declined to apply a particular standard in resolving materiality. See 403 F. Supp. at 217. In *United States* v. *Stassi,* 443 F. Supp. 661, 666 (D. N.J. 1977), aff'd, 583 F. 2d 122 (3d Cir. 1978), the court did state in dictum that "the government still retains the burden of proving knowledge, falsity and materiality of the statement or statements in question beyond a reasonable doubt." We note that neither of the authorities cited by the district court for this proposition supports its conclusion with regard to materiality. Both *United States* v. *Slawik,* 548 F. 2d 75, 87 (3d Cir. 1977), and the legislative history accompanying Title IV of the Organized Crime Control Act of 1970 (codified at 18 U.S.C. 1623), state only that materiality is an element of the crime of perjury. See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 9 (1970). Moreover, Section 1623(e) makes clear that Congress in deleting the two-witness requirement for false statement prosecutions did not intend that the government meet a higher burden of proof than that applicable to ordinary criminal prosecutions. See H.R. Rep. No. 1549, *supra.* Nothing in the legislative history or language of Section 1623(e) suggests that the reasonable doubt standard applies to the legal question of materiality.

In any event, petitioner's sworn statements about his cash wedding gifts were unquestionably material to both his father's trial and the grand jury investigation. Petitioner's testimony concerned cash funds that petitioner initially disclaimed but later asserted were his own. If petitioner had actually received $104,000 in wedding gifts, such sums could account for his father's otherwise unexplained increase in net worth, and the expert witness for the defense so argued at the elder Giacalone's tax evasion trial (Tr. 224-229). Petitioner's testimony at his father's trial was therefore of critical importance to the jury's determination of whether petitioner's father had failed to report his income. Similarly, petitioner's testimony before the grand jury was clearly material to their decision to indict petitioner's father. See *United States* v. *Abrams*, 568 F. 2d 411, 420-421 (5th Cir.), cert. denied, 437 U.S. 903 (1978); *United States* v. *Beitling*, 545 F. 2d 1106, 1109 (8th Cir. 1976), cert. denied, 430 U.S. 918 (1977); *United States* v. *Stone*, 429 F. 2d 138 (2d Cir. 1970). In short, although we believe that factual standards are not pertinent to the determination of the legal question of materiality, petitioner's statements were material "beyond a reasonable doubt."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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